89-639

(4)



No. 89-___

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL FUNERAL SERVICES, INC.,
a West Virginia corporation,

*Petitioner,*

*v.*

JOHN D. ROCKEFELLER, IV, Governor
of the State of West Virginia, *et al.*,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTION PRESENTED

Whether the Fourth Circuit's decision that West Virginia may prevent unlimited telemarketing and door-to-door solicitation of funeral goods and services, when numerous other methods of solicitation are allowed, is worthy of review?

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## STATEMENT OF THE CASE

The State of West Virginia regulates the sale of preneed burial contracts under a statutory scheme established by W. Va. Code §§ 47-14-1 et seq. (hereinafter "the Act"). These contracts cover the sale of certain funeral goods and services as defined by the Act. In 1983

the Act was amended, and certain restrictions were placed on door-to-door solicitation and telemarketing. Specifically, such forms of solicitation were barred absent a prior request from a consumer for such contact. W. Va. Code § 47-14-10. Marketers remain free to solicit door-to-door or by telephone if the consumer makes a prior request for such communication.

Contrary to petitioner's assertions, the Act applies to any person who sells preneed funeral goods or services whether they be funeral directors, cemeterians, or anyone else. The Act's scope distinguishes between the type of item or service sold, not the type of seller. A cemeterian selling caskets or other non-excluded items is fully covered by the Act.

Petitioner marketed preneed funeral goods and services in West Virginia through a variety of means including newspaper advertisement, mass mailings, door-to-door solicitation and telemarketing. The Act does not impose a total

ban on any of these sales methods. It only restricts use of the latter two to instances where a consumer has initiated a request for such contact. The solicitation restrictions at W. Va. Code § 47-14-10 reflect the intent of the Legislature in protecting the privacy and vulnerability of consumers to overreaching. That intent is reflected in W. Va. Code § 47-14-10(e) which provides that:

> "The department may adopt rules regulating the solicitation of preneed contracts by certificate holders or registrants to protect the public from solicitation practices which utilize undue influence or which take undue advantage of a person's ignorance or emotional vulnerability."

After the amendments to the Act were passed in 1983, petitioner filed the case at bar in the United States District Court for the Southern District of West Virginia. Petitioner challenged the solicitation restrictions on telemarketing and door-to-door sales on constitutional grounds. Contrary to petitioner's implication that it was forced to cease

operating in West Virginia, the trial court held that petitioner "made the voluntary business decision to leave the market place * * *. Any possible harm to plaintiff's constitutional rights is totally conjectural, hypothetical, speculative, unsupported and unproved." (Appendix to Petition at B6.) The trial court also found that:

> "8. Even though door-to-door sales and telephone solicitations are prohibited by the statute, except upon request of an interested purchaser, preneed sales businesses have been shown to be profitable even with the 100% trusting requirement. The preneed sales businesses can be operated in compliance with the statute at a profit by the exercise of good business practices." (Appendix to Petition at B4.)

After the trial court denied petitioner's request for relief, an appeal to the Fourth Circuit resulted in an opinion upholding the Act. A petition for rehearing en banc was rejected without one vote of support for petitioner.

The issue raised by this petition is whether this Court should review the Fourth Circuit's decision which held that the West Virginia ban on telemarketing and door-to-door solicitation absent a prior request from a consumer for such contacts did not violate petitioner's First Amendment rights.

## SUMMARY OF ARGUMENT

Petitioner does not raise any significant issue which has not been previously settled by this Court. Both the trial court and the Fourth Circuit decided the First Amendment issues correctly under the test applicable to commercial speech as stated in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980), and recently clarified in Board of Trustees of the State University of New York v. Fox, 492 U.S. ___, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989).

Petitioner's assertion that the distinctions created by the regulatory

provisions of the Act are invidious violations of the First Amendment rights should only be scrutinized in light of whether there was a rational basis for such distinctions. The record supports such rational policy decisions by the Legislature.

Petitioner's claim that the Act violates the Supremacy Clause is without merit because the Federal policy enunciated in the Funeral Rules does not preempt state regulation in the area and because the Act does not thwart the implementation of the Federal policy behind the Funeral Rule.

ARGUMENT: REASONS FOR DENYING THE WRIT

1. Petitioner Fails to Raise Any Significant Issue Which Has Not Been Settled by This Court.

This petition should be denied because it raises no significant constitutional issue that has not been settled by this Court. The recent case of Board of Trustees of the State

University of New York v. Fox, 492 U.S. ___, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989), clarified and reaffirmed Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). Fox held that governmental regulation of commercial speech need not be the absolute least restrictive means to achieve the state's interest. The Court stated that:

> "What our decisions require is a '"fit" between the legislature's ends and the means chosen to accomplish those ends,' * * * --a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' * * * ." Fox, supra, 109 S. Ct. 3028 at 3035.

Petitioner's attempt to distinguish Fox from its case is without merit. The state's interest in protecting the privacy of the home has long been recognized by this Court. Frisby v. Schultz, 487 U.S. ___, 101 L. Ed. 2d 420, 108 S. Ct. ___ (1988); Carey v. Brown, 447 U.S.

455, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980). This interest is even more substantial when it involves the sensitive context of discussing one's death or the death of a loved one with an uninvited stranger. Judge Hall's opinion recognized that such a commercial context was "particularly intrusive" and a "disquieting experience" with potential for "fraudulent overreaching." (Appendix to Petition at B48 and B49.)

The State's regulation of such contact is an obvious reasonable fit. W. Va. Code § 47-14-10(b) and (c) provides that:

> "(b) Notwithstanding any other provision of law to the contrary, nothing in this article shall be construed to restrict the right of a person to lawfully advertise, to use direct mail or otherwise communicate in a manner not within the above prohibition of solicitation or to solicit the business of anyone responding to such communication or otherwise initiating discussion of the goods or services being offered.

"(c) Nothing herein shall be construed to prohibit general advertising."

Thus, a wide variety of solicitation mechanisms remain available to petitioner. Even telemarketing and door-to-door solicitation are allowed if the consumer initiates the contact. Petitioner's assertions that the State imposes a "total" or "absolute" law on door-to-door solicitations and telemarketing (See Petition at i and ii) are simply inaccurate. The restrictive nature of the State's regulations on soliciting are narrowly drawn and, since the interest of the State is substantial, the "fit" is reasonable.

2. The Record Provides Sufficient Factual Justification for the State's Limited Regulation of Telemarketing and Door-to-Door Solicitation.

Petitioner asserts that the State had no factual basis establishing sufficient governmental interests to single out the preneed funeral industry or uninvited telemarketing and door-to-door

solicitation for regulation. This ignores the fact that in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978), this Court rejected an argument that only proof of actual harm to a consumer by petitioner's conduct justifies a regulation. Rather Ohralik recognized the need for "prophylactic measures whose objective is the prevention of harm before it occurs." Ohralik, at 464. Ohralik noted that the Federal Trade Commission had long before identified abuses in the direct-selling industry. Id., and n.23 therein.

Similarly, in the case at bar both the trial court and the Fourth Circuit were alerted to the documented potential for abuse in the funeral service industry and the need for regulation. (Joint-Appendix Vol. I filed with the Appellate Court at 176-77 and 207-82.)

The appellate court's reliance on Ohralik, is well placed. In this case, as in Ohralik, there is an inherently greater risk of overreaching or coercion.

Both cases involve promotion, through personal contact of vulnerable consumers, by one trained to persuade. The "disquieting" and "intrusive" nature of planning one's funeral or the funeral of a loved one is fundamentally different from the door-to-door sales or telemarketing of furniture or appliances which the State has chosen to leave unregulated.

### 3. The State Can Establish Distinctions in Regulating an Industry on a Rational Basis.

Petitioner claims that the Act's distinctions in exempting certain types of sales should be examined by a more stringent test than mere "rational basis." This is a meritless attempt to make a First Amendment claim out of what is really only an equal protection argument.

It is well settled that a statute is not invalid simply because it could have gone farther or because it did not eliminate all potential evils. Katzenbach v. Morgan, 384 U.S. 641, 16 L. Ed.

2d 828, 86 S. Ct. 1717 (1966); Roschen v. Ward, 279 U.S. 337, 73 L. Ed. 722, 49 S. Ct. 336 (1929); Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 79 L. Ed. 1086, 55 S. Ct. 570 (1935); and Williamson v. Lee Optical Co. of Oklahoma, Inc., 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955). Even New Orleans v. Dukes, 472 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976), invoked by petitioner, cites this line of cases with approval.

Petitioner argues that commercial speech is a "fundamental right" justifying more stringent scrutiny of regulation. Significantly, petitioner cites no case, from this Court or any other, holding that commercial speech is a fundamental right analogous to, racial, or religious classifications which are subject to more rigorous scrutiny.

The correct standard for scrutinizing the State's decision to regulate only a portion of solicitation methods and only certain industry practices is merely whether a rational basis existed

for such policy choices. Since this Court has recognized the significant State interests in Ohralik, Frisby, and Carey, supra, and since only commercial speech is involved and it is regulated in a narrowly drawn fashion, the correct standard was applied with a proper result.

### 4. The Fourth Circuit Correctly Rejected Petitioner's Preemption Challenge to the State's Regulation.

The appellate court's discussion of the preemption issue raised by petitioner and the standards set forth in Pennsylvania v. Nelson, 350 U.S. 497, 502-505, 100 L. Ed. 640, 76 S. Ct. 477 (1956), was an accurate interpretation of the law and a correct application of that law to the facts of this case. The Federal Trade Commission's Funeral Rule, 16 C.F.R. §§ 453.1 et seq. neither explicitly nor implicitly precludes state regulation in the area. In fact, the Funeral Rule allows a state to meet or exceed its standards and take over primary enforcement authority. 16 C.F.R. § 453.9(b).

The primary purpose of the Funeral Rule is to promote price disclosures and control certain sales practices. The Act does not thwart these purposes. Compliance with the Act still provides for disclosure of price information by a variety of methods including direct mail, advertising in various media and even over the telephone or by home visits when such contacts are requests by a consumer.

The Act's limits on the disclosure of information in certain narrow contexts, i.e., uninvited home and telephone solicitation, is rationally related to a substantial and legitimate State interest. The limits are narrowly drawn and provide considerable alternative methods of price disclosure. There is no preemption claim because Federal policy is not frustrated. Although petitioner tries to imply that the Funeral Rule compels telephone communication of information, a closer reading reveals that such telephone disclosure is required when the consumer initiates the call. 16 C.F.R. § 453.2(b)(1).

## CONCLUSION

This petition raises no novel issue of constitutional import. A recent decision of this Court clarified the permissible scope of state regulation of commercial speech. The lower courts correctly applied the appropriate legal standards to the facts of this case.

The State of West Virginia has a substantial interest in preventing the potential abuse associated with uninvited telemarketing or home solicitation of funeral goods and services. The State's regulatory scheme is a reasonable response. It leaves petitioner with a wide variety of other means to promote its services; limited only by the imagination of modern marketing techniques. Because the Act is narrowly drafted and leaves petitioner ample alternative means to exercise its right to commercial speech, it does not violate the First Amendment. For the foregoing reasons, respondents request that his petition be denied.

Respectfully submitted,

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[1] On January 16, 1989, Gaston Caperton became Governor of the State of West Virginia.

[2] In 1987 the Act was amended and the Office of the Attorney General replaced the State Department of Labor as the agency responsible for administering the Act.